

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**



**ORIGINAL**  
**No. 74-1674**

**IN THE**  
**United States Court of Appeals**  
**FOR THE SECOND CIRCUIT**

**VIACOM INTERNATIONAL INC., et al.,**

*Plaintiffs-Appellees,*

**vs.**

**TANDEM PRODUCTIONS, INC.,**

*Defendant-Appellant.*

**Appeal From the United States District Court  
for the Southern District of New York.**

**BRIEF FOR DEFENDANT-APPELLANT.**

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**BRIEF FOR DEFENDANT-APPELLANT.**

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**Judge and Opinion Below.**

The District Judge who rendered the decision below was Hon. Murray I. Gurfein; his supporting opinion is reported in *Viacom International, Inc. v. Tandem Productions, Inc.*, S.D., N.Y., 368 F. Supp. 1264. The opinion constituted the court's findings of fact and conclusions of law. [Ibid.]

**Statement of Issues Presented for Review.**

1. Did the District Court err in excluding and denying an offer of proof to the effect that the contract in suit was an illegal one under the antitrust laws and was unenforceable because enforcement of it would in effect enforce the provision (a tie-in arrangement) in which the illegality inhered?
2. Was it error to enforce a contract by which a television network acquired a financial or proprietary



interest in a television program produced by one other than the network, when the contract was executed after the effective date of an FCC regulation prohibiting such contracts, because the contract was recited to have been executed "as of" a time before such effective date?

3. Was it clearly erroneous to find that an oral agreement had been reached, the court having also found that five of the proposed provisions had not been agreed to, but left open to future agreement, the evidence showing that at least the question of who should control the content of the program was not later agreed upon until a superseding written agreement was executed?

4. If there was an oral agreement did the later superseding written contract novate it and thus become a separate and independent contract?

5. When, in the absence of an express provision a contract would not be assignable, and the only provision permitting assignment relates to an assignment of rights, are the obligations and duties required to be performed by the assignor assignable?

### **Statement of the Case.**

#### **1. Nature of the Case.**

In the period 1970-1971 the defendant Tandem Productions, Inc. (hereafter "Tandem"), a producer of television programs or shows, entered into a contract with Columbia Broadcasting System, Inc. (hereafter "CBS"), one of only three national television networks in this country, under which Tandem granted to CBS the right to exhibit over its network a series produced by Tandem called "All In The Family." That

grant, Viacom contended, but Tandem denied, included distribution and syndication rights. Later, CBS purported to assign or grant to Viacom the right to distribute and syndicate the series—*i.e.*, to exhibit or license exhibition of the series on a market-by-market basis as opposed to an electronic distribution by which the broadcasting local station is fed by a network; and including exhibition by a foreign network. [See, *e.g.*, A. pp. 261-262a.] The phrase was somewhat more narrowly defined in the judgment. [See, note 4, *infra*.] This action arises out of a controversy over the validity and efficacy of that purported grant by CBS. Tandem contends, Viacom denies, that the purported grant from CBS to Viacom was invalid and legally ineffective. The action was brought by Viacom to have the grant declared valid, to recover damages allegedly suffered on account of Tandem's claim of right, and to enjoin Tandem's alleged interference with its rights. The District Court agreed in the main with Viacom's position and entered judgment in its favor. This appeal is from that judgment by Tandem.

## **2. The Course of Proceeding.**

The case came to issue upon the Second Amended Complaint in which Viacom sought the declaratory, executive and injunctive relief to which we already have referred, and Tandem's Answer, in which the material charging allegations of the complaint were denied and an affirmative defense alleging invalidity of the contract with CBS under the antitrust laws was set up. Tandem also defended on the ground that the contract between itself and CBS, under which Viacom had to and did claim, was an illegal one, because it contravened a regulation of the Federal Communications

Commission prohibiting the acquisition by networks, such as CBS, of a financial or proprietary interest in a television program produced by another.

The relationship of the parties and the negotiations that led to the CBS-Tandem agreement were explored in detail during the trial.

In the course of that trial Tandem was precluded by the Court's rulings from introducing any evidence in support of its antitrust defense. That result came about in this way: Before trial Viacom moved to strike the defense and for a summary judgment against Tandem thereon. Decision upon the motion was reserved, and the court suggested that Tandem file an offer of proof in support of the defense. Tandem did so.<sup>1</sup> In deciding the case at the conclusion of the trial the court struck the pleaded defense and ruled that the facts offered to be proved were inadmissible. [Appendix, pp. 722a-727a.]

At the conclusion of the trial the District Judge, as we have said, decided the case against Tandem. He found that a binding oral agreement had been made before the FCC Regulation became effective; that the superseding written agreement, though executed after that effective date, had by its terms been made retroactive to a time before that date; that the provision against being relieved by an assignment from the assignor's contractual obligation did not preclude an assignment that in effect transferred those obligations to another; and that the contract, so far as the duties of

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<sup>1</sup>The offer of proof is adequately summarized in the District Judge's opinion and findings. [368 F. Supp. at 1276.] By it Tandem offered, in evidentiary detail, to prove that it was coerced by the economic or market power of CBS into granting syndication rights to "All In The Family," to CBS, as a condition of having access to CBS' network exhibition service.

CBS were concerned was not non-assignable. The judgment conformed to those findings, declared the contract valid and breached, and awarded injunctive relief to Viacom, the assignee.

From that judgment Tandem appeals.

**3. Statement of the Material Facts Relating to the Issues Presented for Review.**

A television series, produced by Tandem and entitled "All In The Family," was submitted to CBS in 1970 as a potential licensee for network exhibition. The series had been submitted to and refused by the other two major national networks, NBC and ABC. [368 F.Supp. at 1268-1269. A. pp. 270a-272a, 278a-279a, 417a-421a, 501a.]<sup>2</sup> Negotiations for conclusion of a network exhibition contract between Tandem and CBS began in the Spring of 1970 and continued more or less continuously thereafter until the latter part of 1971, when a written agreement was executed "as of July 10, 1970." [368 F. Supp. at 1268-1269. A. pp. 284a-285a, 296a-298a, 307a-310a, 450a-461a, 607a-611a, 653a-657a.] It often occurs in the broadcasting industry that "agreements reached are often reduced to writing after they have been already performed in whole or in part . . ." [368 F. Supp. at 1270.] Accordingly, the parties here, obviously looking ahead to ultimately reaching complete agreement, began production and broadcasting of the series, which went on while, at the same time, the parties were continuing to negotiate their

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<sup>2</sup>This Statement is based upon the District Court's findings, supplemented in some instances by reference to the evidence. The findings are referred to by citation to the report of the District Court's opinion and findings in 368 Federal Supplement 1264. The evidence referred to is found in the Appendix, which is identified by the abbreviation "A."

final agreement. [368 F. Supp. at 1270.] The first broadcast or exhibition took place in January, 1971. [A. p. 346a.]

Before the negotiations had eventuated in the written agreement, *i.e.*, in "June-July 1970," an oral agreement, the court found, had been reached. The "essential points" of that agreement were enumerated in the findings. [368 F. Supp. at 1268-1269.] There was not among those points any agreement upon five matters, all of which, excepting the matters of assignability, and which party would off-set the cost of the "black family" had been broached and discussed in the negotiations.<sup>8</sup> [368 F. Supp. at 1269. A. 289a-290a, 429a-432a, 435a-436a, 440a-441a, 457a-459a.]

There was no discussion of an assignment clause in June-July, 1970; the court found, however, that in the "final agreement . . . executed on July 22, 1971 'as of

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<sup>8</sup>In the District Court's language these were the five matters (the bracketed interpolation is also in the court's language, see 368 F. Supp. at 1269, fn. 6):

" . . . (1) whether Canada would be included in the network broadcast area; (2) how much CBS would control the content of the programs; (3) whether it was clear what was meant by CBS' 'standard fees' for distribution; (4) whether CBS would reimburse Tandem for the cost of the 'black family;' [The 'black family' was an essential element in the program idea of exposing the protagonist's ludicrous racism.] (5) and whether the agreement would be assignable."

The District Court did not find directly or explicitly that agreement on these matters was or was not left for future negotiations; but only that "none of these was so material as to permit a finding that the agreement was to be held in abeyance until they were resolved . . ." and that "the evidence establishes that within thirty to sixty days following the negotiations in June, 1970, there was a meeting of the minds on all fundamental matters." [368 F. Supp. at 1269.] In support of that finding about "meeting of the minds" the court relied on Exhibit 76 [368 F. Supp. at 1269 (fn. 7)], which in fact, did not even refer to some of the open matters, *e.g.*, control of programming cost of the "black family" and assignability.

July 10, 1970' " there was an assignment clause providing that "CBS may assign its rights hereunder to any person, firm or corporation provided, however, that no such assignment shall relieve CBS of its obligations hereunder." [368 F. Supp. at 1269.]

There also was discussion in June-July, 1970 of the interest that CBS would get in distribution and syndication rights. [A. pp. 269a-270a, 432a-433a.] The court found that one of the "essential points" of the oral agreement reached during June-July, 1970 was that CBS should have "all syndication and distribution rights ...".<sup>4</sup> [368 F. Supp. at 1268.]

After the June-July, 1970 oral agreement had been made, the parties continued their discussions looking to agreement upon a definitive memorialization of their respective rights. Talks were had, drafts of proposed contracts were exchanged and criticized, and various proposals and counter-proposals were made. The written agreement that resulted from these continued negotiations was executed "as of July 10, 1970" but actually executed between August 26 and September 30, 1971. Tandem executed it between July 29, 1971 and September 22, 1971. The last signature needed to make it effective, that of CBS, was affixed by CBS after September 22, 1971 and on or before September 30, 1971.<sup>5</sup> [Court's Exhibit 3, A. 316a-317a.]

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<sup>4</sup>In its judgment the court defined "to distribute or syndicate," as used in the judgment, to mean "to exercise Tandem's rights under the American Copyright and/or the British Copyright License to distribute each of the episodes of ALL IN THE FAMILY for which CBS contracted under the July 10, 1970 Agreement in the United States, its territories and possessions (including Puerto Rico) and in foreign areas." [A. 730a.]

<sup>5</sup>The testimony in respect of the dates of execution was somewhat fuzzy. The matter was made definite by a stipulation of the parties. [Court Exhibit 3: A. 316a-317a.]

The record is clear to the effect that CBS was made emphatically aware, during the negotiations, that Tandem wanted the services and expertise in the telecasting industry that CBS had, not those of any other concern or entity of whom they knew little or nothing. It was also made clear to CBS that Tandem did not want any assignment of its contract with CBS to others. [A. pp. 329a-334a, 473a, 633a-635a, 645a-648a, 651a-652a.] Indeed, the District Court found that when "Tandem came to a meeting of the minds with CBS, it had the right to assume that non-network syndication and foreign distribution would be performed by CBS itself or by its wholly-owned subsidiary, CBS Enterprises, which normally handled television distribution . . ." [368 F. Supp. at 1272.]

On May 4, 1970—which was before the alleged oral agreement of June-July, 1970—the Federal Communications Commission adopted its so-called "financial interest rule," the purport of which was to prohibit any television network from acquiring a financial or proprietary interest in any television program produced by a person other than the television network.<sup>6</sup> [*FCC Rules and Regulations*, sec. 73.658, par. (j)(1)(ii).] As originally enacted, the rule became effective Septem-

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<sup>6</sup>It has never been disputed in this case that, from the time it became effective, the "financial interest rule" applied to a network such as CBS and a contract such as the one it allegedly made with Tandem. Nor has it been disputed that a contract to which the rule applied would be an invalid one if it violated the rule. The dispute here is only whether the rule applies to a contract, supplanting an earlier oral agreement, that was admittedly executed after the rule became effective but which contract it was provided should be effective "as of" a date before the

ber 1, 1970, which date was postponed by the Commission to October 1, 1970. [368 F. Supp. at 1271.] By virtue of an order of this Court in connection with certain litigation to which the instant parties were not parties, the effective date was further postponed to July 23, 1971. [*Mount Mansfield Television, Inc. v. FCC*, 2 Cir., 442 F. 2d 470.]

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rule's effective date. It is Tandem's contention that contracting parties cannot, by the simple expedient of agreeing to retroactivity, evade the regulatory or prohibitory force of an otherwise binding rule.

## ARGUMENT.

### I

**It Was Error to Exclude Evidence That the Contract in Suit Was Violative of the Antitrust Laws, for by Enforcing Such a Contract the Court Aids Itself a Participant in a Party's Violation of Federal Law.**

Tandem offered to prove that the contract in suit was violative of the antitrust laws "because CBS coerced Tandem into granting it the syndication rights by conditioning Tandem's access to the CBS television market during prime evening hours upon the granting of such rights" [368 F. Supp. at 1276.] The offer, in short, was to prove that the contract included a tying provision that was violative of the anti-trust laws [see, e.g., *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5].<sup>7</sup> Enforcement of the contract in the instant action enforces precisely that tying provision, for it is the syndication rights that Viacom claims it has and which, the court below determined, it did have as the consequence of the assignment to it of the CBS-Tandem contract. The court, nonetheless, ruled that the offered facts did not prove the defense, seemingly because to uphold it would permit Tandem to reap the benefits without assuming the burdens of the contract; and because, too, the attempted enforcement of the contract was "a separate matter which requires the active intervention of a court of equity to enforce it . . ." [368 F. Supp. at 1276-1277.]

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<sup>7</sup>The facts upon which this defense was based were included in the offer of proof in evidentiary detail. [See, 368 F. Supp. at 1276.] The District Court correctly assumed that the offered facts could be proved. [368 F. Supp. at 1276.]

In reaching this result the court below put heavy reliance on *Kelly v. Kosuga*, 358 U.S. 516, which, in fact, recognizes the very distinction that makes the proffered defense a good one in the case at bar. The line of distinction, as it was put in *Kelly, supra*, 358 U.S. at 520-521, is between, on the one hand, not "enforcing the precise conduct made unlawful by the [Sherman] Act . . ." and on the other, giving effect to ". . . the overriding general policy . . . 'of preventing people from getting other people's property for nothing when they purport to be buying it'. . . ."

In our case there is no question of getting anything for nothing. Everything that Tandem agreed to pay for what it was to get under the contract has been paid; at least it never has been contended that Tandem did not make any payment or render any other consideration called for by the contract. Furthermore, and perhaps even more importantly, the "precise conduct made unlawful" by the FCC rule is enforced and aided by the judgment. That conduct, according to the offer of proof, was the tying of a sale or grant of distribution and syndication rights to the sale or grant of network exhibition rights. The judgment enforces the tied provision; and in that way gives Viacom the aid of the court in making effective the illegal tying agreement. The court should not make itself an aider and abettor of illegal conduct; there is a vast difference between enforcing a contract "not in itself illegal, *nor part of nor in execution of any general plan or scheme that the law condemned . . .*" and a contract "based upon agreements that were and are essential parts of an illegal scheme." [*Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U.S. 227, 259-261. Court's italics. To the same effect in respect of unenforceability

are: *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346, 353-357; *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173, 175-176, 177; *E. Bement & Sons v. National Harrow Co.*, 186 U.S. 70, 87-88. Other cases recognizing the distinction to which we have referred are: *Bruce's Juices v. American Can Co.*, 330 U.S. 743, 754-755; *D. R. Wilder Mfg. Co. v. Corn Products Ref. Co.*, 236 U.S. 165, 176-177; *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540, 550-551; *Farbenfabriken Bayer A.G. v. Sterling Drug*, 3 Cir., 307 F. 2d 207, 208-209; *Kentucky Rural Elec. Coop. Corp. v. Moloney Elec. Co.*, 6 Cir., 282 F. 2d 481, 484.]

As this Court has said in respect of a contract that violated an OPA price regulation, "such a violation is a valid defense at least where, as in this case, the court is asked to enforce the very promises in which the violation inhered." [*Bromberg v. Moul*, 2 Cir., 275 F. 2d 574, 577.]

So it is here. The facts offered to be proved should have been held to be a defense to this action for they would have shown that the contract sought to be enforced was itself an illegal contract under the antitrust laws, because it was a tying agreement. It was "the very promises in which the violation inhered" that were sought to be enforced and which were enforced by the judgment. Furthermore, to uphold the defense would not give to Tandem anything for which it had not paid.

The court below did not place its decision, nor did Viacom object to the offer of proof, upon the ground that the offered facts would not prove an antitrust violation. There can be no real doubt that they would have proved one, since they read directly upon the accepted definition of a "tie-in arrangement," i.e., the

conditioning of the sale of one commodity upon the purchase of another. [See, e.g., *Northern Pacific R. Co. v. United States*, *supra*, 356 U.S. at 5; *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 604-606.] The offered facts would have shown that CBS conditioned the sale of its network exhibition service upon the purchase of its distribution and syndication service. These two services are different commodities, relating to separate exhibitions in different areas or by different exhibitors or at different times. [See, e.g., note 4, *supra*.]

## II

**The Contract Through Which Viacom or CBS Must Deraign Their Respective Rights Was an Illegal One Because It Was in Violation of the FCC "Financial Interest" Rule Prohibiting Acquisition by a Television Network of a Financial or Proprietary Interest in a Television Program Produced by Someone Other Than the Network.**

There can be no question that the written contract executed "as of July 10, 1970, was executed not earlier than September 30, 1971. That fact is established by a stipulation of the parties. [See, Court's Exhibit 3, A. pp. 316a-317a.] Neither can there be any question that that contract purports to grant to CBS a financial or proprietary interest in a television program produced by one other than the "network," i.e., CBS. It is, therefore, undeniable that if the FCC "financial interest" rule was applicable, and it was, the contract was invalid. [Cf., *Bromberg v. Moul*, 2 Cir., 275 F. 2d 574, 577, holding illegal a contract made in violation of OPA price ceilings.] The court below, however, found two reasons not to apply the financial interest rule. One of these was that by its terms the contract was made

effective "as of" a time before that rule became effective. [368 F. Supp. at 1270]; the other was that there was a binding agreement for syndication, *i.e.*, the oral agreement arrived at in June-July, 1970, which was entered into before the financial interest rule became effective. [368 F. Supp. at 1271-1272.] Neither reason is a tenable one.

*First:* It may be that ordinarily there is no legal impediment in the way of parties agreeing that a contract into which they are entering should have the same consequences upon their respective rights as if it had been entered into at an earlier time. When that is what they do they are, in realistic effect, doing no more than dealing with their own property and rights *vis-a-vis* each other, retroactively instead, as is more usual, contemporaneously or prospectively. That is in substance all that can be said to have been done in the cases cited by the court below. [See, 368 F. Supp. at 1270.]

The case is much different, however, when the effect of ante-dating the contract is, purportedly, to take it out of the operation of a prohibitory or regulatory statute—or what amounts to the same thing, a valid administrative regulation—that but for the ante-dating would apply to invalidate the contract. It is self-evident, we submit, that public policy does not permit any such easy escape from a statute or regulation designed, in the public interest, to prohibit the making of certain kinds of contracts or to regulate their scope and content. It would be idle to attempt any such prohibition or regulation if all that contracting parties had to do to evade it was to agree that their contract should be effective as of a time before the statute or regulation became effective. There are cases that are analogous

and persuasive in principle and rationale in this regard. A good example is *United States v. Murtaugh*, 4 Cir., 190 F. 2d 407; others are *Kaiser-Frazer Corp. v. Otis & Co.*, 2 Cir., 195 F. 2d 838; *Jarrett v. Pittsburgh Plate Glass Co.*, 5 Cir., 131 F. 2d 674; *United States for use of Vermont Marble Co. v. Roscoe-Ajax Construction Co.*, N.D., Cal., 246 F. Supp. 439; *Ful-Vue Sales Co. v. American Optical Co.*, S.D., N.Y., 118 F. Supp. 517.<sup>8</sup>

*Second:* The prohibitory effect of the financial interest rule is not escaped, although the court below thought it was [see, 368 F. Supp. at 1270], by the fact that, as the court said, an oral agreement was reached before the rule became effective. For at least two reasons, that agreement came to an end when the written agreement was executed, so that Viacom's rights must be deraigned, if at all, from the latter.

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<sup>8</sup>In *United States v. Murtaugh* on OPA price regulation governing the sale of houses and lots, was sought to be evaded by the simple expedient of adding to the price an amount for extras added to the building, in which scheme the purchasers were participants. That attempted evasion did not withstand the scrutiny of the Court of Appeals, which said: "... It is not within the power of the parties to a contract, subject to valid governmental regulation, to frustrate the will of Congress and to ignore *pro tanto* its legislative fiat. Such has been the uniform conclusion of the courts which have considered the subject. [Cits.]" [190 F. 2d at 409. Court's italics.]

In *Vermont Marble Co.*, the question was whether the parties could by contract prohibit "the laying of venue in the district which otherwise is expressly required to be the exclusive venue" by the applicable statute. The court held they could not. [246 F. Supp. at 441, *et seq.*]

*Kaiser-Frazer Corp.* was a case in which the corporation's contract (for the sale of its stock) was strictly not within the terms of a prohibitory statute, but, because it was the initial step in the public offering of securities (the statute applying to a public offering) "... was so closely related to the performance of acts forbidden by law as to be itself illegal ..." [195 F.2d at 844.]

*Ful-Vue Sales Co.*, is similar in import to *Kaiser-Frazer Corp.* [118 F. Supp. at 529.]

In the first place, it is obvious that the written agreement was intended to be a substitute for or novation of the oral agreement.<sup>9</sup> The effect of substitution or novation is, of course, to discharge the original agreement. [*Corbin on Contracts*, vol. 6, p. 185, sec. 1293; *Williston on Contracts*, 3d ed., vol. 15, p. 582, sec. 1865; *Alexander v. Angel*, 37 Cal. 2d 856, 236 P. 2d 561, 563.]

In the second place, the oral agreement was superseded by and merged in the integrated written agreement by dint of operation of the parol evidence rule.<sup>10</sup> The usual statement of the rule is put thus in *Restatement Contracts*, sec. 237:

"... the integration of an agreement makes inoperative to add to or vary the agreement all contemporaneous oral agreements relating to the same subject-matter; and also, unless the integration is void, or voidable and avoided, all prior oral or written agreements relating thereto . . ."

See, also: *G. L. Webster Co. v. Trinidad Bean & Elevator Co.*, 4 Cir., 92 F. 2d 177, 178-179.

<sup>9</sup>The parties contemplated the ultimate reduction of their agreement to writing. [A. pp. 449a-450a, 456a-457a.] Whether they did or not, the written memorial of their agreement was the final expression of their complete contract, designed to take the place of what had gone before. That is shown by the fact that it is the agreement upon which Viacom sued [A., p. 120a] and to which the judgment is solely and expressly applicable. [A., p. 731a.] It is also shown by the fact that the terms and provisions of the writing are materially different from those of the oral agreement. That is significantly so in respect of the matter of assignment, upon which Viacom must depend for its asserted rights. There was no oral agreement on assignment; that matter was not even discussed. [368 F. Supp. at 1270.] It became a part of the contractual arrangement by its incorporation in the written agreement.

<sup>10</sup>The court below invoked the parol evidence rule [368 F. Supp. at 1273-1274.] It is at least as applicable to the agreement as a whole.

It follows that "we must look to the written contract alone to determine . . ." whether and when CBS acquired the rights it purported to assign to Viacom. [*Brewer v. National Surety Corp.*, 10 Cir., 169 F. 2d 926, 928.] From the moment the written contract came into being it was the only existing and effective contract between Tandem and CBS. That contract had an existence of its own, in no way dependent upon the oral agreement or upon anything that had gone on before. Its validity and legal effect, of course, depend upon the law applicable to it when it was made.

There can be no doubt that when it was made, part of the law applicable to it was the financial interest rule. By a stipulation of the parties, the date of its execution in fact, as distinguished from ante-dating, was conclusively established, as a time after the rule became effective. [Court's Exhibit 3; A., pp. 316a, 317a.]

### III

#### **The Assignment to Viacom Had the Effect of Transferring CBS' Contractual Obligations to Viacom and, Therefore, Went Beyond the Limits of the Power of Assignment Conferred by the Contract.**

*First:* It is the general rule, as the New York Court of Appeals, for example, has said, "that rights arising out of a contract cannot be transferred if they are coupled with liabilities, or if they involve a relationship of personal credit and confidence . . ." [*Paige v. Faure*, 229 N.Y. 114, 127 N.E. 898, 10 A.L.R. 649, 652.] The contract here—the oral one as well as the written—is of that class. Here the contract gave CBS the right to distribute and syndicate "All In The Family." Coupled with that right was the obligation or duty

to do that syndication or distribution, for it was from the syndication or distribution that Tandem would derive its return from television exhibition of the program in areas and by stations and at times not included in the CBS network exhibition. The right and the liability were bound together. [*Cf.*, *In re Waterson, Berlin & Snyder Co.*, S.D., N.Y., 36 F. 2d 94, 96.] Further, as we have seen, it was performance of this duty by CBS that Tandem wanted, and as the court found, "it had the right to assume that non-network syndication and foreign distribution would be performed by CBS itself or by its wholly-owned subsidiary, CBS Enterprises, which normally handled television distribution . . ." [368 F. Supp. at 1272.]

The oral agreement was not by its terms made assignable, but there was an assignment clause of a kind in the written contract. [368 F. Supp. at 1269.] Because of the general rule of non-assignability of contracts like the one here involved, the oral contract was not assignable at all. It is, therefore, the written agreement alone to which Viacom must look for the rights in "All In The Family" it now claims. The purported assignment to it from CBS was ineffective, however, not alone because of its illegality [see Point II, *supra*], but because what was done by way of assignment transcended the bounds of the power of assignment given CBS in the written agreement.

The assignment clause did not authorize assignment of the contract or of the duty or obligation of performing it; but only of the "rights" under it. [368 F. Supp. at 1269.] What was assigned to Viacom, however, was the "distributorship" that CBS had undertaken and which, Viacom had the right to assume, would be

carried on by CBS.<sup>11</sup> [368 F. Supp. at 1272, 1273.] That was much more than a mere transfer of CBS' rights under the contract; it transferred the obligation to carry on the distributorship and to do the work of syndication or distribution from which Tandem would realize the financial returns that exploitation of the series would bring.

The "right" acquired by CBS under the contract was the right to receive the distribution or syndication fees called for by the contract. It is immaterial that this right may have been assignable. More than that was assigned, for along with the right to receive those fees went the obligation, or duty, of doing the distribution or syndication. That was the duty Tandem wanted CBS to perform, obviously because it believed the expertise and facilities of CBS were such as to provide the best chance of realizing the optimum return to itself from distribution and syndication. The assignment clause did not permit CBS to unburden itself of the obligations and responsibilities to Tandem it had undertaken. By assigning to the extent and in the way that it did, CBS in practical effect abandoned those obligations and responsibilities, putting them in the hands of Viacom.<sup>12</sup>

*Second:* The assignment clause is explicit to the point "that no such assignment shall relieve CBS of its obligations hereunder." [368 F. Supp. at 1269.] If all that clause was intended to accomplish was to keep CBS liable for any failure of performance on Viacom's part, it was unnecessary. It had that liability as a matter

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<sup>11</sup>The court below in its findings used the word "distributorship" to describe what was assigned to Viacom. [368 F. Supp. at 1273.]

<sup>12</sup>CBS in effect confirmed its abandonment by taking the position below that it was now only a stakeholder. [368 F. Supp. at 1267.]

of law, without express statement in the agreement. [See, e.g., *Corbin on Contracts*, vol. 4, p. 452, sec. 866.] The clause must have had a different purpose. That purpose was to put a limit on the right of assignment granted in the preceding clause of the assignment provision.

The assignment provision had the effect of making rights under the contract assignable, whereas without it they would not have been. Because those rights were bound to the duties of distributorship and syndication, it was desirable to express the idea that exercise of the power to assign rights would not have the effect of relieving CBS of its obligations. The word "rights" was an inapt way to encompass assignment of the latter, if that was what was wanted. The parties knew that "right" and obligation" were two different things, for they used the two words in the same sentence. The intention, therefore, is evident not to include obligations within the category of assignability.

#### IV

#### **No Oral Agreement Came Into Being Because a Material Element—Who Should Control the Content of the Program—Was Left Open to Future Agreement.**

The court below found that the "negotiations between Tandem and CBS in June-July, 1970 resulted in an oral agreement later memorialized in a written contract, dated 'as of July 10, 1970.' . . ."<sup>13</sup> [368 F.

<sup>13</sup>The importance of this issue is self-evident. If there was no oral agreement in June-July, 1970, the later memorialization was not of an existing oral agreement but of a different and independent one. The rights of CBS and Viacom, therefore, would necessarily have been dependent upon this agreement alone; and since it was actually executed after the financial interest rule had become effective, it was an illegal contract. [See, Point II, *supra*.]

Supp. at 1268.] That finding is clearly erroneous for, as the court itself found, there were not less than five open items upon which, though canvassed by the negotiators, agreement had not then been reached; and even if, as the court also found, agreement was later reached, the oral agreement was still incomplete and inchoate. The important matter of control of the content of the program was still open for future agreement.<sup>14</sup> The court below found that the parties "came to a sensible agreement about it, providing that the program would ridicule the far 'left' as well as the far 'right' . . ." [368 F. Supp. at 1269.]

The court below correctly referred to the "well-known doctrine that if a material element of a contemplated contract is left for future negotiation, the contract is unenforceable . . ." citing, *inter alia*, *Willmott v. Giarraputo*, 5 N.Y. 2d 250, 157 N.E. 2d 282, 283, which unquestionably supports the court's statement of the doctrine. See, also, to the same general effect: *V'Soske v. Barwick*, 2 Cir., 404 F. 2d 495, 500;

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<sup>14</sup>To be sure, at some unspecified time Lear (of Tandem) met with Jencks (of CBS) and discussed, not who should control content, but Jencks's "feelings about content and his desire to know more about what I [Lear] felt the show would be about . . ." [Lear Dep., p. 110.] Also part of the discussion was the inquiry by Jencks "whether or not it would be possible to construct 'All In The Family' in such a way as to present a balanced view of the opposing social and political philosophies?" [Lear Dep., p. 110.]

The only people at this meeting were Jencks and Lear. [Lear Dep., p. 109.] Jencks did not testify at all. Lear certainly did not testify that agreement on *control* of content was reached or even mentioned. [Lear Dep., pp. 109-111.]

Even in respect of the general kind of program that was contemplated, the court's finding goes beyond the evidence of the meeting between Jencks and Lear upon which the court based its finding. There was no testimony that *any* agreement was reached at this meeting; only that the subject of the kind of program it would be was discussed. [See, Lear Dep., pp. 109-111, *passim*.]

*Patrolmen's Benev. Assoc. v. City of New York*, 27 N.Y. 2d 410, 267 N.E. 2d 259, 261. Here, the question of who should control the content of the program was not resolved before the written agreement was executed a year or more later.<sup>15</sup>

It is self-evident that content-approval is a matter of extreme importance and materiality in a contract for production and exhibition of a television program. To the producer (Tandem), the kind, content and elements of the program to be produced will be in the control of another, thus limiting its freedom of productive action. To the exhibitor (CBS), the kind of program it will get to exhibit will be beyond its control unless it is given some authority in that regard. The finding that this provision of the oral contract was agreed to is not supported by, but is contrary to, the evidence. [See, note 13, *supra*.] The finding, therefore, is clearly erroneous.

#### Conclusion.

The judgment appealed from should be reversed.

Respectfully submitted,

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<sup>15</sup>What is meant by control of the content of a program is illustrated by paragraph 8 of that contract:

"CBS shall have full prior approvals with respect to all key creative elements and of such cast members, if any, who are featured in at least seven programs . . ." [Exhibit 65A.]

### PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 6500 Flotilla Street, Los Angeles, California.

On August 9, 1974, I served the within

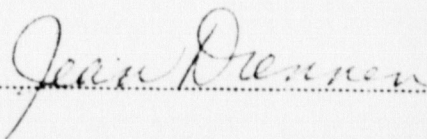
BRIEF FOR APPELLANT, in re: "Viacom International Inc. vs. Tandem Productions, Inc.", in the United States Court of Appeals for the Second Circuit, No. 74-1674;

on the attorneys in said action, by placing  
5 copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

HUGHES, HUBBARD & REED  
One Wall Street  
New York, New York 10005

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on August 9, 1974, at Los Angeles, California

  
.....

Service of the within and receipt of a copy  
thereof is hereby admitted this.....9<sup>th</sup>.....day  
of August, A.D. 1974.

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